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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. McLAINE AUGUST TELLE, Defendant and Appellant.	A099265 (Napa County Super. Ct. No. CR106133)

Defendant McLaine Telle appeals from his conviction of sexual penetration of a victim prevented from resisting by intoxication. He contends the trial court unnecessarily and improperly instructed the jury on what is meant by "prevented from resisting," and incorrectly defined the mens rea required for a violation of Penal Code section 289, subdivision (e).[1] He also challenges under constitutional and statutory grounds the admission of evidence of defendant's conviction of a prior sex offense. We find no merit in any of his contentions and affirm.

BACKGROUND

Defendant was charged in count one with forcible rape (§ 261, subd. (a)(2)); in count two with rape of an unconscious person (§ 261, subd. (a)(4)); in count three with penetration with a foreign object by force (§ 289, subd. (a)(1)); and in count four with penetration by a foreign object where the victim is prevented from resisting by an

[1] All further statutory references are to the Penal Code, unless otherwise noted.

intoxicating substance (§ 289, subd. (e)). The jury found him guilty in count four, not guilty in count two, and guilty of the lesser included offense of battery (§ 242) in counts one and three. Defendant was sentenced to the midterm of six years.

At trial there was evidence of the following facts. On the night of August 17, 2001, the victim, Jane Doe, went to her cousin Melinda's house for a "girls' night out." After Doe had three shots of GoldSchlager, a friend drove her and Melinda to a bar where she drank four or five more drinks in two hours. The drinks made Doe feel woozy, so she drank water for the rest of the evening.

Doe and Melinda returned to Melinda's house to find several people socializing on the front porch. Melinda was drunk and upset with her fiancée, and she went inside with Doe and vomited in her room. Doe, with the assistance of Melinda's roommate, Kurtis, attended to her and cleaned up the mess. After helping Melinda, Doe was dizzy, and could not stand straight; she fell asleep, fully clothed, on the lower bunk in the bedroom of Melinda's children.

When Doe awoke, she was unclothed and defendant, whom she did not know, was on top of her. She initially thought it was her boyfriend until she heard defendant's voice. She was "groggy," "in a daze," and "disoriented." She drifted in and out of sleep, "felt like [she] was in a dream" and wondered, "what is going on, why is this, who is this." Defendant's penis was inside of her and defendant also digitally penetrated her rectum and vagina. Doe scratched the defendant and pushed against the mattress, trying to get away. She then blacked out and moments later awoke to the defendant turning her from her back to her stomach in an attempt to have anal intercourse.

After a few minutes, defendant left the room, saying he would be back "in a minute." Doe, afraid and confused, closed the door and crawled onto the top bunk where she dressed and then pretended to sleep. Defendant had gone outside and Doe could hear him laughing and smoking with Kurtis. A few minutes later, defendant returned to the room, got onto the bottom bunk, and fell asleep. Doe got down and left the room.

Doe tried unsuccessfully to wake Melinda and then went to Kurtis's room. Kurtis tried to calm her, but Doe was "angry[, c]onfused and upset . . .[and] in pain." They

yelled at each other and Kurtis told her to leave. On her drive home, Doe stopped at a gas station and called 911. When police officers arrived at the gas station, she smelled of alcohol and was "extremely hysterical. She was crying and shaking." The officers took Doe back to Melinda's house to identify defendant. There, an officer woke defendant and told him that she was investigating a sexual assault. Defendant denied sexually assaulting Doe and claimed that the contact was consensual.

At trial, defendant testified that he walked into the children's bedroom to ask Doe for a phone number and found her on the bottom bunk. She was not certain of the number, but as they talked, the mood became flirtatious and they began to kiss, embrace, and eventually had consensual intercourse.

A criminalist testified that at 6:30 a.m. Doe's blood alcohol level was .05 percent. Assuming Doe stopped drinking at 12:00 a.m., he estimated that by 3:30 a.m., the time of the assault, her blood alcohol level would have been .10 percent. Defendant's blood alcohol level was .10 percent at 6:15 a.m. Assuming defendant stopped drinking at 2:30 a.m., his blood alcohol level would have been approximately .15 percent at 3:30 a.m.

Over defendant's objection, the court admitted, under Evidence Code section 1108, the testimony of Jane Doe Two. Doe Two testified that in January 1994, when she was a freshman in high school, defendant, then age 18, and another young man sexually assaulted her. After consuming two to four shots of alcohol, Doe Two went with defendant and Leonard Scroggins to defendant's house. There, Scroggins groped Doe Two but she told him "no," and went into defendant's bedroom and passed out. When she awoke, defendant was pulling her pants down and Scroggins was fondling her chest. Defendant and Scroggins then took turns raping her as she screamed "no" and struggled against them. Defendant hit the back of her head and neck and threatened that if she did not cooperate, he would rape her from behind. Defendant left the room and returned with a knife. One of the two men held a knife to her throat as she continued to struggle. Scroggins then began to choke her, at which point defendant threw Scroggins off and tied him until the police arrived.

Defendant admitted sexually assaulting Doe Two. He testified that after raping her, he consoled her, and told her to lock herself in the bathroom while he detained Scroggins. Defendant and Doe Two called the police together. Defendant pleaded guilty to digital penetration and was sentenced to a maximum term of four years in the California Youth Authority.

DISCUSSION

I. The Trial Court Properly Instructed the Jury on the Meaning of "Prevented from Resisting"

Defendant was charged in count four with a violation of section 289, subdivision (e), which forbids "sexual penetration when the victim is prevented from resisting by any intoxicating or anesthetic substance . . . and this condition was known, or reasonably should have been known by the accused . . . ." The trial court instructed the jury, pursuant to CALJIC No. 1.23.2, as follows: "In the crime charged in count four, an essential element of the crime is that the alleged victim was prevented from resisting the act by an intoxicating substance. 'Preventing from resisting' means that as a result of intoxication, the alleged victim lacked the legal capacity to give consent. Legal capacity is the ability to exercise reasonable judgment, that is, to understand and weigh, not only the physical nature of the act, but also its moral and probable consequences. [¶] In making this determination, you must consider all of the circumstances surrounding the act, including the alleged victim's age and maturity. It's not enough that the alleged victim was intoxicated to some degree, or that the intoxication reduced the person's sexual inhibitions. [¶] Impaired mentality may exist and yet the individual may be able to exercise reasonable judgment with respect to the particular matter presented to his or her mind. Instead the level of intoxication and the resulting mental impairment must have been so great that the alleged victim could no longer exercise reasonable judgment concerning that issue."

Defendant asserts that "prevented from resisting" by alcohol should not have been defined since the words have a clear ordinary meaning: "when the alcohol stops, keeps, or precludes [the victim] from withstanding sexual advances." Defendant contends that

in ordinary usage, "prevented from resisting" requires the victim to be intoxicated to the point where she is unable to demonstrate "an outward manifestation of refusal, whether physical or verbal," and that this requirement was improperly omitted from the court's instruction. Defendant contends that the court's instruction reduced the prosecution's burden of proving the offense.

CALJIC No. 1.23.2, adopted in 2001, is derived from *People v. Giardino* (2000) 82 Cal.App.4th 454 (*Giardino*). In that case, the defendant was convicted of multiple counts of rape by intoxication (§ 261, subd. (a)(3))[2] after the trial court had declined to instruct the jury on the meaning of "prevented from resisting." (*Giardino, supra,* at p. 459.) The Court of Appeal held that it was error not to have explained to the jury that rape by intoxication is "committed when the victim is so intoxicated that he or she is incapable of exercising the judgment required to decide whether to consent to those sexual acts . . . ." (*Id.* at pp. 458, 468.) Most of the language now contained in CALJIC No. 1.23.2 was taken verbatim from the *Giardino* opinion. (See *id.* at pp. 466-467.)

As the *Giardino* court observed, the statutory language may suggest that the victim's consent is at issue, which the California Supreme Court long ago held is not the case. (82 Cal.App.4th at p. 461.) Distinguishing forcible rape that occurs because the victim does not give her actual consent from rape that occurs because the victim is incapable of giving legal consent, *Giardino* elaborated on the similarity between rape sections pertaining to a victim who is unable to give legal consent because of a mental disorder or physical disability and those sections which describe a person incapable of giving legal consent because of intoxication. (*Id.* at p. 462.) "In both cases, the issue is

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[2] Section 261, subdivision (a)(3) provides: "Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: [¶] . . . [¶] (3) Where a person is prevented from resisting by any intoxicating or anesthetic substance . . . and this condition was known, or reasonably should have been known by the accused." Sections 261 and 289 are thus alike except that the former involves "sexual intercourse" whereas the latter entails "sexual penetration." Section 289, subdivision (e) was enacted in 1987 in an effort to make the criteria used to determine the commission of each of the four major sex crimes (rape, sodomy, oral copulation, and foreign object rape) consistent. (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 3485 (1986).)

not whether the victim actually consented to sexual intercourse, but whether he or she was capable of exercising the degree of judgment a person must have in order to give legally cognizable consent. [¶] In reaching that conclusion, we reject the defendant's contrary, more literal construction . . . ." (*Ibid*.)

Far from being a novel construction as defendant argues, the CALJIC instruction merely articulates what case law and common sense have recognized for years. As *Giardino* explains, "The case law interpreting the former resistance requirement demonstrates that the exertion of physical force by the victim against the defendant was not required; verbal protestations alone were sufficient to establish resistance. [Citations.] Therefore, to be intoxicated to a degree that rendered the victim physically unable to resist would mean that the victim was unable to even speak. The line between that extreme level of intoxication and absolute unconsciousness is very thin. There is no indication in our decisional law that section 261(a)(3) has ever been interpreted to apply only to such severely incapacitated victims." (82 Cal.App.4th at pp. 462-463.)

Defendant disagrees with *Giardino*'s reading of prior case law, citing a curious string of cases that supposedly support his position. (E.g., *People v. Lay* (1944) 66 Cal.App.2d 889, 893 [forcible rape where victim consumed no alcohol and the court noted, regarding her lack of resistance, that the victim had a right to choose between rape and strangulation]; *People v. Mack* (1992) 11 Cal.App.4th 1466, 1481 [interpreting "administered by or with the privity of the accused," which language has since been removed from the statute, but noting that a resistance-suppressed state may be short of insensateness].) Some of the cases defendant cites do involve victims who were drugged into near-unconsciousness. (*People v. O'Brien* (1900) 130 Cal.3d 1, 5 [victim was "in a state of unconsciousness or in such condition as to be incapable of resistance"]; *People v. Lusk* (1985) 170 Cal.App.3d 764, 771 [victim's free will was "destroyed" by drugs].) While intoxication to the point of unconsciousness certainly indicates that the victim has been "prevented from resisting," it does not follow that a conscious victim cannot also be prevented from resisting due to intoxication. Indeed, if section 289, subdivision (e) were read to mean that the victim must be intoxicated to the point of losing consciousness, the

subdivision would be superfluous, since subdivision (d)(1) criminalizes sexual penetration of an unconscious person.

A fuller review of the case law confirms *Giardino's* conclusion that rape victims often have been found to have been "prevented from resisting" when conscious, physically able to talk and to resist, yet lacking the ability to exercise reasonable judgment. (*Giardino*, *supra,* 82 Cal.App.4th at pp. 462-463.) For example, in *People v. Wojahn* (1959) 169 Cal.App.2d. 135, 139, the victim after receiving drugs "was unable in standing against a wall with her eyes closed to touch her nose with her fingers. She felt light and relaxed, her feet felt glued to the floor, and she felt as though her body were swaying." Yet, although she felt "groggy," she was capable of feeling the defendant have sexual intercourse with her, and there is no indication that she was physically incapable of expressing resistance. (*Id*. at pp. 140-141.) Similarly, in *People v. Ing* (1967) 65 Cal.2d 603, 607, the defendant, a doctor, gave the victim a shot that made her "light-headed" and like she "just didn't care about anything," but there was no evidence to suggest she was unable to speak or otherwise to resist the defendant. Indeed, she testified that she would not have had intercourse with the defendant had it not been for the shots because she "wouldn't be interested in someone like him." (See also *People v. Crosby* (1911) 17 Cal.App. 518, 522-523 [victim felt weak and dizzy and "didn't know half the time what [she] was doing," but she voluntarily accompanied the defendant to a lodge more than five hours after drinking a glass of wine alleged to have been laced with a drug].) As the *Giardino* court concluded, "the fact patterns in [these] cases are inconsistent with an interpretation . . . that would require the victims to be so intoxicated that they are physically incapable of either speaking or otherwise manifesting a refusal to give actual consent. Instead, they support the conclusion that the statute requires only that the level of intoxication be such that the victim is incapable of exercising the judgment required to decide whether to consent to intercourse." (*Giardino*, *supra*, 82 Cal.App.4th at p. 464.)

Defendant argues that this interpretation disregards the legislative history of the statute. In 1980, the Legislature amended the rape statutes to eliminate the need for

physical resistance by the victim to establish a forcible rape, but retained the "prevented from resisting" language in those sections that define a rape by the incapacity of the victim to consent. (Compare Stats. 1979, ch. 994, § 1, p. 3383, with Stats. 1980, ch. 587, § 1, p. 1595; see *Giardino, supra*, 82 Cal.App.4th at p. 462.) Defendant argues that by retaining the "prevented-from-resisting" language in some sections while eliminating the resistance requirement in others, the Legislature evidenced the intent to require a physical "resistance element" to establish the nonforcible sexual offenses. We fail to follow the logic of this argument. As pointed out in *Giardino*, "In discussing the elements of rape of a mentally incompetent person (§ 261, former subd. 2, now subd. (a)(1)), the [Supreme Court] said: 'In this species of rape neither force upon the part of the man, nor resistance upon the part of the woman, forms an element of the crime. If, by reason of any mental weakness, she is incapable of legally consenting, resistance is not expected any more than it is in the case of one who has been drugged to unconsciousness, *or robbed of judgment by intoxicants.*' [Citations.]" (82 Cal.App.4th at pp. 461-462.) If resistance was never an element of nonforcible sexual assaults, the Legislature can hardly be understood to have intended to add a "resistance element" to these offenses by *removing* the necessity for physical resistance for a forcible offense. Rather, as our predecessors on this division pointed out shortly after the statute was amended, the difference in terminology is more likely explained by the desire to avoid using language that might suggest that rape by intoxication is negated if the victim is responsible for her own state of intoxication. " '. . . To instruct that a defendant is guilty of rape when the victim's will was overcome with intoxicants is to invite an irrelevant inquiry regarding the voluntariness of the victim's ingestion.' A lay jury might conclude that a person who voluntarily ingests a substance has not submitted to sexual intercourse against her will. It is less confusing to instruct a jury that rape occurs when the person is prevented from resisting by alcohol or drugs." (*People v. Salazar* (1983) 144 Cal.App.3d 799, 807-808.)

Finally, defendant asserts that CALJIC No.1.23.2 impermissibly lowers the prosecution's burden by making the standard "much easier to meet because a person's reasonable judgment can be affected by even small amounts of alcohol, while a person

must be in a more advanced state of intoxication to be 'prevented from resisting.' " The instruction that was given, however, expressly requires the jury to find that the victim had an elevated level of intoxication: "*It's not enough that* [*the*] *alleged victim was intoxicated to some degree,* or *that the intoxication reduced the person's sexual inhibitions*. [¶] Impaired mentality may exist and yet the individual may be able to exercise reasonable judgment with respect to the particular matter presented to his or her mind. *Instead the level of intoxication and the resulting mental impairment must have been so great* that the alleged victim could no longer exercise reasonable judgment concerning that issue." (Italics added.) CALJIC No. 1.23.2 thus properly explains the absence of the ability to exercise judgment that is necessary to establish that the victim was "prevented from resisting" and does not improperly reduce the prosecution's burden of proving the offense.

II. CALJIC No. 1.23.2 Is Not Unconstitutionally Vague

Defendant contends that construing section 289, subdivision (e) as articulated in CALJIC No. 1.23.2 violates due process principles because it does not provide adequate notice of the conduct that the statute proscribes.

The constitutional guarantee of due process of law requires "a reasonable degree of certainty in legislation, especially in the criminal law . . . ." (*In re Newbern* (1960) 53 Cal.2d 786, 792.) " 'It is not necessary that a statute furnish detailed plans and specifications of the acts or conduct prohibited.' [Citations.] 'All that is required is that the statute be reasonably certain so that persons of common intelligence need not guess at its meaning.' [Citations.] . . . 'So long as the language embodies an objective concept, it is constitutionally concrete.' " (*People v. Linwood* (2003) 105 Cal.App.4th 59, 68-69 (*Linwood*).)

The interpretation of a statute implicates a defendant's due process rights when that interpretation affects an unforeseeable expansion of criminal conduct. (*People v. Rathert* (2000) 24 Cal.4th 200, 209.) As the United States Supreme Court has explained, "[A]lthough clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, [citations], due process bars courts from applying a novel

construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope [citations]. In each of these guises, the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." (*United States v. Lanier* (1997) 520 U.S. 259, 266-267.)

In *Linwood*, *supra*, 105 Cal.App.4th at pages 68-69, the court explicitly rejected the argument defendant makes here. "We are also unpersuaded by Linwood's contention the word 'prevented' in the phrase 'prevented from resisting' is impermissibly vague. (§ 261, subd. (a)(3).) Linwood faults the statute for not providing a guideline for verifying at what point a person is prevented from resisting. We disagree. 'It is not necessary that a statute furnish detailed plans and specifications of the acts or conduct prohibited.' [Citation.] 'All that is required is that the statute be reasonably certain so that persons of common intelligence need not guess at its meaning.' [Citations.] 'The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding.' [Citation.] 'So long as the language embodies an objective concept, it is constitutionally concrete. [Citation.]' [Citation.] The phrase 'prevented from resisting' is composed of words with a commonly accepted meaning: both individually and collectively these words are understandable by persons of ordinary intelligence." (*Linwood*, *supra*, at p. 69.) "There are commonly recognizable indications of a person's intoxication, including an odor of alcohol, slurring of speech and unsteadiness, that enable one to reasonably determine if another no longer has the ability to resist. Section 261, subdivision (a)(3) is sufficiently certain to meet minimal standards of due process." (*Linwood*, *supra*, at p. 70.)

Defendant does not claim that the wording of CALJIC No.1.23.2 is vague. Rather, he again argues that the *Giardino* interpretation was "novel," so that he could not reasonably be expected to have been aware what the statute prohibited. Given the lengthy history of usage of the statutory phrase "prevented from resisting" as described in *Giardino* (see *People v. Wojahn*, *supra*, 169 Cal.App.2d at pp. 135, 139, *People v. Ing*,

supra, 65 Cal.2d at p. 607; *People v. Crosby*, *supra*, 17 Cal.App. 518 at pp. 522-523; *People v. Lusk*, *supra*, 170 Cal.App.3d at p. 771), the CALJIC instruction certainly is not a "novel" construction. Furthermore, Giardino had clarified any confusion regarding the meaning of the statute before the episode underlying defendant's conviction occurred. (*Giardino*, *supra*, 82 Cal.App.4th at p. 458.)

Finally, defendant argues that the rule of lenity, whereby courts must resolve doubts as to the meaning of a statute in a criminal defendant's favor, compels the court to strictly construe the statute and necessarily hold the CALJIC instruction impermissible. " 'Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.' " (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 313.) However, " 'The rule [of lenity] applies only if the court can do no more than guess what the legislative body intended; there must be an egregious ambiguity and uncertainty to justify invoking the rule.'" (*People v. Avery* (2002) 27 Cal.4th 49, 58, citing 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000).) Here, no such ambiguity existed. Defendant's construction disregards a long history of consistent case law interpreting sexual offenses by intoxication, so that there is no occasion to invoke the so-called ruled of lenity.

III. CALJIC No. 10.33 Correctly Sets Forth the Mens Rea Required Under Penal Code Section 289, Subdivision (e)

The court instructed the jury pursuant to CALJIC No. 10.33, which tracks the language of section 289, subdivision (e) as follows: "Every person who commits an act of sexual penetration when the victim is prevented from resisting by any intoxicating substance, and this condition is known or reasonably should have been known by the accused, is guilty of a violation of Penal Code Section 289(e), a crime." Defendant contends that by authorizing a conviction if one "reasonably should have" known of the victim's condition, the instruction unconstitutionally imposes a standard lower than criminal negligence.

This contention too was considered and rejected in the recent decision in *Linwood*, *supra*, 105 Cal.App.4th at pages 70-72. There the court explained that "[r]ape is a general intent crime [citations], and requires only the perpetrator's criminal intent to commit sexual intercourse without the partner's consent." (*Id.* at p. 70.) The rape statutes identify several circumstances that make sexual intercourse nonconsensual and therefore criminal. Those circumstances include situations in which the victim lacks capacity to consent because of a mental disorder or disability, unconsciousness, or a level of intoxication that prevents resistance. In each of these three circumstances, "the accused either must have known or reasonably should have known of the victim's particular condition that precluded consent. [¶] Linwood asserts that section 261, subdivision (a)(3) eliminates the mens rea requirement by including in its reach one who 'reasonably should have known' the victim's intoxication prevented resistance. The statute, however, does not eliminate the knowledge requirement; rather, it sets a standard of knowledge or constructive knowledge. [¶] . . . [¶] Under the criminal negligence standard, knowledge of the risk is determined by an objective test: "[I]f a *reasonable person* in defendant's position would have been aware of the risk involved, then defendant is presumed to have had such an awareness." ' " (*Id.* at p. 71.)

Like the defendant in *Linwood,* defendant here seizes on a portion of a footnote in *In re Jorge M.* (2000) 23 Cal.4th 866, 887, footnote 11, in which our Supreme Court commented that the " 'reasonably should have known' formulation departs somewhat from the usual description of criminal negligence. (See, e.g., *People v. Peabody* (1975) 46 Cal.App.3d 43, 47 ['[T]o constitute a criminal act the defendant's conduct must go beyond that required for civil liability and must amount to a "gross" or "culpable" departure from the required standard of care. [Citations.] The conduct must be aggravated or reckless . . . .']." In *In re Jorge M.*, the Supreme Court was required to determine whether the "reasonably should have known" standard was appropriate where the statute in question was silent on the subject. Here, section 289, subdivision (e) explicitly adopts that standard. In all events, the court there held that the crime of possession of an assault weapon does not require proof that the defendant actually knew

of the characteristics of the weapon that make it an assault weapon. Proof that the defendant reasonably should have known is sufficient. (23 Cal.4th at pp. 869-870.) The footnote to which defendant refers goes on to point out that the negligence standard was appropriate there because what was involved was "defendant's awareness of the characteristics of a possessed item rather than his awareness of the harmful consequences of an action." (*Id.* at p. 887, fn. 11.) Similarly, what is involved here is defendant's awareness of the characteristics of his victim, namely her level of intoxication, rather than his awareness of the harmful consequences of his action. In order to violate the statute, the defendant must have had the general intent to sexually assault the victim, but he is held to have known that the victim could not resist because of her intoxication under an objective, reasonable person standard. *In re Jorge* thus provides authority for upholding, rather than rejecting, the instructions given in this case.

Even if the instructions that the court gave were erroneous in this respect, the error would have been harmless beyond a reasonable doubt. Doe testified that she went to sleep intoxicated and clothed and awoke to find herself naked with the defendant on top of her. Kurtis had told defendant that Doe and Melinda had come home drunk. When she awoke to find defendant on top of her, Doe testified that she was unable to keep her eyes open and drifted in and out of sleep. A police officer confirmed that Doe smelled of alcohol after the assault. Defendant maintained that he and Doe engaged in a conversation, which lead to consensual intercourse. By convicting defendant of penetration of an intoxicated victim and sexual battery, the jury necessarily rejected defendant's version of events and accepted Doe's version. There is little doubt that the jury would have reached the same result even if required to have found that defendant knew the victim could not resist because she was intoxicated.

IV. The Admission of Evidence of a Prior Offense Under Evidence Code Section 1108 Did Not Violate Defendant's Right to Due Process or Equal Protection

Defendant contends that Evidence Code section 1108, which authorizes admission of evidence of a prior sexual assault, is unconstitutional. Further, he argues that the court should have excluded the evidence under Evidence Code section 352 as it was more

prejudicial than probative. Defendant's arguments fail on both procedural and substantive grounds.

Evidence Code section 1108, subdivision (a) provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101,[3] if the evidence is not inadmissible pursuant to Section 352."

Defendant objected to the admission of evidence of the uncharged prior sexual offense on the grounds that the People failed to give the 30 days' notice required by Evidence Code section 1108, subdivision (b),[4] and that the evidence would be unduly prejudicial, time consuming, and confusing and thus should be excluded under Evidence Code section 352. Because defendant's objection below was not based on constitutional grounds, he may not assert such grounds on appeal. " 'It is "the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal." ' " (*People v. Vichroy* (1999) 76 Cal.App.4th 92, 97, quoting *People v. Raley* (1992) 2 Cal.4th 870, 892; see also *People v. McPeters* (1992) 2 Cal.4th 1148, 1188 [by failing to object to evidence of other crimes on constitutional grounds below, defendant waived his federal due process and equal protection challenges on appeal]; *People v. Benson* (1990) 52 Cal.3d 754, 788 [defendant waived federal due process and equal protection challenges by failing to make a sufficient constitutional objection at trial].)

In his reply brief, defendant argues that if the failure to have made this contention below bars consideration of the constitutional issues on appeal, then counsel was

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[3] Evidence Code section 1101, subdivision (a) provides: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

[4] The court found that there had been substantial compliance with the procedural requirements of Evidence Code section 1108 and defendant does not press this issue on appeal.

ineffective for failing to make the proper objection. However, as pointed out below, the constitutional arguments that defendant raises belatedly have been explicitly rejected by prior decisions of our Supreme Court and courts of appeal. (*People v. Falsetta*, 21 Cal.4th 903 (*Falsetta*); *People v. Fitch* (1997) 55 Cal.App.4th 172 (*Fitch*); *People v. Jennings* (2000) 81 Cal.App.4th 1301 (*Jennings*).) Counsel is not ineffective when reasonably relying on such prior authority. (See *Strickland v. Washington* (1984) 466 U.S. 668.)

Had defendant objected on constitutional grounds below, his argument would have been unavailing. "[T]he trial court's discretion to exclude propensity evidence under section 352 saves section 1108 from defendant's due process challenge. As stated in *Fitch* [*supra*, 55 Cal.App.4th 172], '[S]ection 1108 has a safeguard against the use of uncharged sex offenses in cases where the admission of such evidence could result in a fundamentally unfair trial. . . . *With this check upon the admission of evidence of uncharged sex offenses in prosecutions for sex crimes, we find that . . . section 1108 does not violate the due process clause*.' " (*Falsetta*, *supra*, 21 Cal.4th at pp. 917-918.)

While the Supreme Court has not explicitly ruled on defendant's contention that section 1108 violates equal protection principles, appellate courts, including this one, have rejected this argument with respect to section 1108 and a similar provision, section 1109 (*Fitch*, *supra*, 55 Cal.App.4th at pp. 184-185; *Jennings*, *supra*, 81 Cal.App.4th at pp. 1310-1311) and the Supreme Court has cited the *Fitch* court's analysis with apparent approval (*Falsetta*, *supra*, 21 Cal.4th at p. 918). According to *Fitch*, "The Legislature determined that the nature of sex offenses, both their seriousness and their secretive commission which results in trials that are primarily credibility contests, justified the admission of relevant evidence of a defendant's commission of other sex offenses. This reasoning provides a rational basis for the law. . . . In order to adopt a constitutionally sound statute, the Legislature need not extend it to all cases to which it might apply. The Legislature is free to address a problem one step at a time or even to apply the remedy to one area and neglect others." (55 Cal.App.4th at pp. 184-185.) We see no justification for departing from this analysis.

Finally, defendant contends that the trial court abused its discretion under Evidence Code section 352 in admitting evidence of his uncharged offense against Doe Two. He maintains that the prior assault was dissimilar, remote in time, and unduly prejudicial. We review a trial court order denying a defendant's motion to exclude evidence pursuant to Evidence Code section 352 for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 213.) "We will not overturn or disturb a trial court's exercise of its discretion under section 352 in the absence of manifest abuse, upon a finding that its decision was palpably arbitrary, capricious and patently absurd." (*Jennings*, *supra*, 81 Cal.App.4th at p. 1314.)

Under Evidence Code section 352, the trial court is required to evaluate whether the probative value of the evidence of the defendant's uncharged sex offense was "substantially outweighed by the probability that its admission [would] . . . create . . . undue prejudice, of confusing the issues, or of misleading the jury." "Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Falsetta*, *supra*, 21 Cal.4th at p. 917.) The probative value of the evidence is increased when the charged and uncharged crimes involve different victims, and the prejudicial effect of the uncharged crime is reduced if it resulted in a conviction and prison term, because the jury will not be tempted to convict the defendant to punish him for the uncharged crime. (*Ibid.*)

The trial court here expressly engaged in the appropriate weighing process: "The prior offense is not too remote to be excluded, it's only a few years old. . . . I think both offenses did involve a sleeping victim. Certainly has a strong tendency to prove the belief that the defendant engaged in aggressive sexual behavior against another victim,

and depending on which version of the facts you believe, forced himself on her along with somebody else. [¶] So it's highly probative on the issue of whether it [consensually] occurred in the current case or not. [¶] I don't find the consumption of time would substantially outweigh its probative value. And although it's damaging to the defendant's case if believed, I don't think it's too prejudicial to be admitted under 352. I don't think it will confuse the jury at all. [¶] So for those reasons, I will not exclude the evidence under 352. And the evidence of the prior sexual activity is generally admissible."

It is apparent that the court below considered the proper factors. The charged and uncharged acts were similar and thus probative. The two crimes involved different victims but shared many characteristics. In both cases, defendant attacked the victim in the bedroom of a residence where he was present under social circumstances. Each victim was under the influence of alcohol, had fallen asleep, and awoke to find that the defendant was sexually assaulting her. In both cases, the victim's unsuccessful attempts to resist defendant were followed by defendant threatening to or actually turning the victim onto her stomach so that he could rape her from behind.

Defendant argues that the prior offense was unduly prejudicial because it involved a gang rape of a minor with the use of a knife. While these facts undoubtedly are inflammatory, the likelihood of prejudice was reduced by the fact that defendant pleaded guilty and was punished for the prior assault. Further, although Doe Two was only 14 years of age at the time of the assault, defendant, at 18, was only a few years older. Defendant asserts that the offense was too remote because it occurred almost eight years earlier, but this spread of years does not compel exclusion of the evidence. (*People v. Branch* (2001) 91 Cal.App.4th 274, 284-285 [probative value of testimony that defendant had sexually assaulted victim's grandmother almost 30 years earlier was not substantially outweighed by the danger of unfair prejudice]; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [evidence concerning molestations of anther victim that allegedly occurred 18 to 25 years prior to the charged incident was not unduly prejudicial]; *People v. Douglas* (1990) 50 Cal.3d 468, 511 ["the remoteness of evidence

goes to its weight and not to its reliability"], disapproved on other grounds in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.)

The trial court's decision to admit the evidence was not arbitrary or capricious, nor was it patently absurd. Although the prior sexual assault evidence may have been damaging to defendant's defense, the trial court did not abuse its discretion by finding that its probative value outweighed its prejudicial effect.

DISPOSITION

The judgment is affirmed.

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Pollak, J.

We concur:

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Corrigan, Acting P. J.

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Parrilli, J.